STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
EDWARD MCGRONE,	)	
	)	
	)	
Complainant,	)	CHARGE NO(S): 2006SF1865
	)	EEOC NO(S): N/A
and	)	ALS NO(S): S07-100
	)	
MENTAL HEALTH CENTERS OF CENTRAL ILLINOIS,	)	
	)	
	)	
Respondent.	)	

NOTICE

You are hereby notified that the Illinois Human Rights Commission has not received timely exceptions to the Recommended Order and Decision in the above named case. Accordingly, pursuant to Section 8A-103(A) and/or 8B-103(A) of the Illinois Human Rights Act and Section 5300.910 of the Commission's Procedural Rules, that Recommended Order and Decision has now become the Order and Decision of the Commission.

STATE OF ILLINOIS)
HUMAN RIGHTS COMMISSION) Entered this 9th day of February 2010

N. KEITH CHAMBERS
EXECUTIVE DIRECTOR

STATE OF ILLINOIS

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RECOMMENDED ORDER AND DECISION

This matter is ready for a Recommended Order and Decision pursuant to the Illinois Human Rights Act (775 ILCS 5/1-101 et seq.). A public hearing was held before me on July 10, 2007 in Springfield, Illinois, although *pro se* Complainant left the public hearing during Respondent's presentation of its case in chief. Respondent filed a post-hearing brief. Complainant has not filed a post-hearing brief, although the time for doing so has expired.

Contentions of the Parties

In the instant *pro se* Complaint, Complainant asserts that he was the victim of race discrimination when Respondent transferred him to a different work site as a result of a report that he had an unauthorized visitor at a group home where he had been working. He also contends that he was discriminated on account of his race when he was placed on re-orientation status after having been accused of another workplace violation, and when he was subsequently terminated for having been accused of sleeping on the job. Complainant alternatively maintains that his termination was in retaliation for having complained about racially discriminatory working conditions.

Respondent, however, disputes the reasons for imposing discipline on Complainant and asserts that any adverse act taken against Complainant was for reasons unrelated to his race or to any alleged complaint of racial discrimination in the workplace.

Findings of Fact

Based on the record in this matter, I make the following findings of fact:

1. At all times pertinent to the instant case, Respondent operated a series of group homes that housed individuals, who were either physically and/or mentally disabled. While residents in the group homes were free to come and go upon notice to Respondent's staff, residential advisors and others were scheduled to work in the group homes on a 24-hour basis to attend to the needs of the residents.

2. While the record is unclear as to when Complainant was initially hired by Respondent, the record shows that Complainant, an African-American, was hired by Respondent in the position of residential advisor by October of 2005 and was working the 12:00 a.m. to 8:00 a.m. shift in one of the group homes operated by Respondent.

3. At all times pertinent to the instant Complaint, the job duties of a residential advisor consisted of supervising the residents of the group home, being available for counseling for said residents, and periodically checking on the welfare of the residents.

4. At some point prior to October 4, 2005, one of the residents of a group home informed Sue Schmedeke, a case manager, that Complainant was seen at 3:00 a.m. coming out of the bathroom with his shirt off and his belt open. The resident further indicated that when she went into the bathroom, she encountered a woman with a pillow who had begged the resident not to tell anyone. Schmedeke in turn drafted a report concerning what she was told about the incident and tendered the report to Brenda Diedrich, Respondent's administrator of its group homes, who served as a second tier supervisor of Complainant.

5. At some point between October 4, 2005 and October 12, 2005, Dietrich held a meeting with Complainant to discuss the bathroom incident. The reported incident concerned Dietrich because Respondent had a policy that restricted visitors from entering the group home due to certain confidentiality rights granted to the residents under the Mental Health and Developmental Disabilities Confidentiality Act. Dietrich also thought that allowing visitors into the group home would hinder the ability of residential advisors to monitor the residents. During the meeting, Complainant indicated that the incident took place at 6:30 a.m., as opposed to 3:00 a.m. as reported by the resident, and that the woman at issue in the incident was his wife, who had dropped off their grandchild with the consent of case manager Cindy Lopian.

6. At the end of the meeting, both Dietrich and Complainant agreed to have Complainant work in another group home. Complainant was eventually assigned to a group home that housed nine individuals diagnosed with various mental disabilities that included schizophrenia, bipolar disorder and/or major depression.

7. At all times pertinent to the instant Complaint, the group home to which Complainant was assigned consisted of a long building that had a connected residential office, a dining room that contained a television, a "crisis" office, where residents would come for assistance in resolving their problems, and a series of bedrooms.

8. From some point after Complainant's reassignment to a different group home in October of 2005 and continuing through December of 2005, Complainant was observed by at least two other residential advisors sleeping at least three to four times a week in front of the television in the dining room area during his 12:00 a.m. to 8:00 a.m. shift. During these sleeping episodes, Complainant was typically seen by these residential advisors as sleeping on three or four dining room chairs that had been pulled together to form a makeshift bed, as well as a bag that served as a makeshift pillow.

Complainant also used a blanket during his sleeping episodes and typically pulled his shoes off. Throughout this time, Complainant was also observed to be snoring.

9. At all times pertinent to the instant Complaint, sleeping on the job was not a permitted activity by the residential advisors because one of the main functions of the job was to monitor the residents and to be alert to their needs. This requirement was especially important for residential advisors on the 12:00 a.m. to 8:00 a.m. shift since individuals at the group home to which Complainant was assigned easily confused their days and nights, such that they needed counseling to encourage them to go to bed when they were observed wandering around the facility during the early morning hours.

10. On December 29, 2005, Complainant left his shift at 3:10 a.m. without authorization from a supervisor. At that time, Complainant reportedly told others that he wanted to obtain gas at a gas station. In a report concerning the incident, Dietrich was informed that after he had left the group home on the night in question, Complainant did not return to the shift, but rather called the group home at 4:30 a.m. indicating that he needed to go home, and then called again at 5:10 a.m. indicating that he would not be returning to work.

11. On January 5, 2006, Dietrich and Complainant held a meeting regarding Complainant's unauthorized absence on December 29, 2005. At no time during the meeting did Complainant inform Dietrich about a racially insensitive remark made to Complainant from a co-worker. After the meeting, Dietrich placed Complainant on "re-orientation training" for a period of three months. At all times pertinent to the instant Complaint, placement on "re-orientation training" was a form of probationary status that meant that Complainant could be terminated for violation of any personnel policy during said training period. Complainant was thereafter warned in a January 5, 2005 memorandum from Dietrich that he could be terminated if he violated any personnel policy during his time spent on "re-orientation training."

12. On January 16, 2006, Betty Bryant, another residential advisor assigned to the group home in which Complainant was working, observed Complainant sleeping with a blanket and makeshift pillow on three chairs that had been drawn together in front of the television. While Bryant had witnessed other episodes of Complainant's sleeping in this manner at the group home during his shift, Bryant decided to report the incident to her supervisor on this occasion because Complainant's snoring could be heard in the crisis room while she was attempting to counsel a resident.

13. After Dietrich had received a written report of Complainant's January 16, 2006 sleeping incident from Bryant's supervisor, Dietrich confirmed with Bryant and another co-worker (Roy Scott) that Complainant had in fact been sleeping on the job on the night in question by pulling up chairs in front of the television. Both co-workers also told Dietrich that Complainant had been sleeping in this manner on many other occasions.

14. On January 19, 2006, Dietrich decided to terminate Complainant based upon the report of his sleeping on the job and upon the fact that Complainant had committed the offense while on "re-orientation training" status.

15. In Dietrich's prior seven year tenure as Respondent's administrator, two individuals (one African-American and one Caucasian) had been terminated for sleeping on the job.

16. At no time during Complainant's tenure at Respondent did Complainant inform Dietrich that he experienced racial harassment and/or racial discrimination.

Conclusions of Law

1. Complainant is an "employee" as that term is defined under the Human Rights Act.

2. Respondent is an "employer" as that term is defined under the Human Rights Act and was subject to the provisions of the Human Rights Act.

3. Complainant failed to establish a *prima facie* case of race discrimination with respect to his transfer to a different group home, his placement on "re-orientation training" status or his termination.

4. Complainant failed to establish a *prima facie* case of retaliation with respect to his termination.

5. Respondent has articulated a legitimate, non-discriminatory reason for its decision to transfer Complainant to a different work site, to place Complainant on "re-orientation training" status and/or to terminate Complainant.

6. Complainant has failed to prove by a preponderance of the evidence that the reason given by Respondent for transferring him to a different work site, for placing him on "re-orientation training" status and for terminating him were pretexts for race discrimination and/or unlawful retaliation.

Determination

Complainant has failed to establish by a preponderance of the evidence that Respondent violated either section 2-102 or 6-101(A) of the Human Rights Act (775 ILCS 5/2-102, 6-101(A)) when it transferred Complainant to a different work site, placed Complainant on "re-orientation training" status or terminated Complainant.

Discussion

Race Discrimination.

In a case alleging a discriminatory application of an employer's imposition of discipline upon an employee, the Commission and the courts have applied a three-step analysis to determine whether there has been a violation under the Human Rights Act. (See, for example, *Thomas and Merrill Dow Pharmaceutical*, 14 Ill HRC Rep 81 (1984), and *Loyola University of Chicago v Human Rights Commission*, 149 IllApp3d 8, 500 NE2d 639, 102 IllDec 746 (1st Dist, 3rd Div 1986).) Under this approach, the complainant must first establish a *prima facie* case of unlawful discrimination by a preponderance of

the evidence. Then, the burden shifts to the respondent to articulate a legitimate, non-discriminatory reason of the action taken against the complainant. If the respondent is successful in its articulation, the presumption of unlawful discrimination is no longer present in the case (see, *Texas Department of Community Affairs v Burdine*, 450 US 248, 101 SCt 1089, 67 LEd2d 207 (1981)), and the complainant is required to prove by a preponderance of the evidence that the respondent's articulated non-discriminatory reason is a pretext for unlawful discrimination. This latter requirement merges with the complainant's ultimate burden of proving that the respondent discriminated unlawfully against the complainant. See, *Village of Oak Lawn v Human Rights Commission*, 113 IllApp3d 221, 478 NE2d 1115, 88 IllDec 507 (1st Dist, 4th Div. 1985).

Accordingly, Complainant must set forth a *prima facie* case of race discrimination as his first step in establishing a discrimination claim based on race. Although standards for establishing a *prima facie* case of race discrimination will vary from case to case, one way to establish a race discrimination claim is to show that similarly-situated co-workers of a different race who committed a similar infraction of the work rules were treated more favorably than the complainant. (See, *Loyola* 500 NE2d at 645-746, 102 IllDec at 752-53.) While our Complainant has not filed a brief in this matter, it appears that Complainant took this approach during the portion of the public hearing in which he participated since he claimed during the public hearing that other co-workers committed similar infractions in the workplace but did not receive similar discipline.

For example, Complainant conceded at the public hearing that having visitors such as his wife in a group home was a violation of Respondent's policy. (Tr at 38.) However, he asserts that his transfer to a different work site because of said incident was an act of race discrimination because one white co-worker named Julie (no last name established) was allowed to have her dog at one of the group homes and another white co-worker named Pauline Tabits had visits at one of the group homes from a

boyfriend. The problem with Complainant's contention, though, is that neither Julie nor Pauline Tabits are suitable comparatives for purposes of his race discrimination claim since: (1) Complainant conceded at the public hearing that he did not know if management was aware of any of the alleged visits from Tabits' boyfriend: (2) Dietrich stated that she was unaware of any employee named Pauline Tabits under her supervision (see, for example, *Taff v Caterpillar, Inc*, IHRC, S12027, July 7, 2008, where the Commission recognized that the lack of a common decision-maker precluded the complainant from establishing a prima facie case of discrimination based on similar work misconduct from his co-workers); and (3) Dietrich explained that having a dog at a group home would not violate Respondent's confidentiality policy, which was the basis for the no visitor rule. As such, I find that Complainant has not established a *prima facie* case of race discrimination based upon his transfer to a different work site where Complainant failed to establish that anyone under Dietrich's supervision received more lenient treatment for a violation of Respondent's confidentiality policy.[1]

As to Complainant's placement on "re-orientation training" status, I initially note that Complainant claimed that his placement was based on the fact that he was accused of sleeping on the job. However, Respondent introduced a memorandum dated January 5, 2006 and signed under protest by Complainant, that indicated that the reason for Complainant's placement on "re-orientation training" status was because he had been reported as being away from the group home without authorization from his supervisor. Unfortunately, Complainant left the public hearing before the disparity in rationales for the discipline could be cleared up, and thus, based upon Dietrich's testimony and the

[1] Because Complainant has failed to establish a suitable comparable employee, I need not address the secondary issue as to whether the instant transfer to a different work site constituted an actionable adverse act where the record shows that there was no pay or shift consequence, and where Complainant indicated at the public hearing that the only negative consequence was the fact that he did not have the established rapport with the residents at the new group home that he had with residents at his prior facility.

contents of the memorandum, I find that Respondent's version of the reason for the imposition of said discipline was the truth. Nevertheless, Complainant asserted at the public hearing that his placement on "re-orientation training" status was a racially discriminatory act since a co-worker named Julie (last name not established) left a group home at some point in time during her shift. However, Complainant provided no details regarding the alleged incident involving Julie, such that I do not know when it happened, who knew about the alleged incident, and whether Julie had permission from her supervisor to leave the group home. Moreover, like the situation with Complainant's assignment to a different group home, there was no evidence that the decision-maker (Dietrich) had been aware of Julie's alleged violation of Respondent's policy, or evidence disputing the report that Complainant was off the work site without authorization. Accordingly, because I cannot say that Dietrich was doing anything different from what she allowed Complainant's co-workers to do when placing Complainant on "re-orientation training" status, I find that Complainant failed to establish a *prima facie* case of race discrimination based upon his placement on "re-orientation training" status for having left the work site without authorization.

Complainant's claim with respect to his termination based upon the report that he was sleeping on the job, though, is an arguably closer question. During the public hearing, Complainant did not dispute the claim that he had been sleeping on the job or the fact that Dietrich conducted an investigation of the report that he had been found sleeping at the work site. However, Complainant insisted that a co-worker named Tim (no last named established) at the work site slept on the job, and indeed, one of the witnesses at the public hearing (Betty Bryant), who had reported Complainant's sleeping to her supervisor, conceded that she had on a few occasions caught herself dozing off at her work station during her shift. Moreover, Dietrich acknowledged Complainant's claim that Tim had slept during one of his shifts, and that a television belonging to one of the

residents in the group home had turned up temporarily missing while Tim had been sleeping.[2]

A closer examination of the circumstances surrounding the sleeping incidents involving Bryant and Tim, though, indicates that neither of them are suitable comparatives for establishing a *prima facie* case of race discrimination even though neither co-worker had been terminated from his or her positions. Specifically, Bryant testified that, unlike Complainant, she never acted on her drowsiness by pulling chairs together in front of the television set to form a makeshift bed or gathered a blanket and a makeshift pillow, and that she never intended to sleep during her shift. Moreover, there was no evidence that Bryant was on "re-orientation training" status at the time of any of her instances of drowsiness. Additionally, unlike Complainant's circumstances, there was no evidence that Dietrich had been aware of any reports of Bryant sleeping on the job.

True enough, Dietrich admitted to knowing about the sleeping incident concerning Tim and acknowledging that Tim had received discipline short of termination for said incident. However, Dietrich testified that Tim was not on "re-orientation training" status at the time of his sleeping incident and further asserted that, unlike Complainant, Tim had self-reported the incident to management. Moreover, the January 5, 2006 memorandum from Dietrich that was signed by Complainant specifically warned Complainant that he was subject to termination upon the finding of any violation of Respondent's personnel policies during his "re-orientation training," and Complainant has not established that sleeping on the job was not a violation of Respondent's policy or that Respondent did not treat such a violation seriously. Thus, I find that Tim is not a suitable comparative for purposes of establishing a *prima facie* case of race

[2] Subsequent investigation revealed that the television had been retrieved by a relative of the owner of the television set.

discrimination because Complainant did not establish that Tim had the over-all disciplinary history that Complainant had at the time of Complainant's termination so as to make him a suitable comparative. Accordingly, I find that Complainant has failed to establish a *prima facie* case of race discrimination as to all three aspects of his claim where Complainant has not shown that a similarly-situated co-worker received more lenient treatment for the workplace infractions committed by Complainant.

Retaliation.

In his *pro se* Complaint, Complainant asserts that he was the victim of unlawful retaliation when he was terminated on January 19, 2006, purportedly for violating a workplace rule against sleeping on the job, after having previously told Dietrich on January 5, 2006 (the same day that he was placed by Dietrich on "re-orientation training" status) about a racially insensitive remark made by a co-worker. Contrary to the allegations in the Complaint, though, Complainant conceded at the public hearing that he did not tell Dietrich about the alleged remark (Tr at pg 45-46), but further testified that he told another supervisor (Schmedeke) about the alleged incident, and that Schmedeke indicated to him that she would do nothing to remedy the situation. Complainant's testimony, though, does not particularly advance his retaliation claim since: (1) Dietrich was the individual who made the decision to terminate Complainant; (2) the Commission has already rejected the notion that liability under the retaliation provisions of the Human Rights Act can be established based solely on the knowledge of non-decision-makers about a protest of discrimination (see, for example, *Osman v State of Illinois, Department of Corrections*, IHRC, S04-222, December 22, 2005); and (3) Complainant failed to show that Schmedeke, who allegedly knew about Complainant's prior protest, played any role in the decision to terminate Complainant. Accordingly, because Dietrich credibly denied ever knowing about any prior protest of racial harassment/discrimination, Complainant's retaliation claim can be denied on this basis alone.

Parenthetically, even if Complainant had been able to establish that Schmedeke played some role in bringing to Dietrich's attention the January 2006 sleeping incident that proved to be the catalyst for his termination, Complainant would still lose on his retaliation claim since the record showed that Dietrich conducted her own investigation, which produced statements from at least two co-workers, confirming the prior reports that Complainant had been intentionally sleeping on the job on the night in question and had been doing so for quite some time. As such, to the extent that Complainant was telling the truth with respect to his complaint of racial harassment/discrimination, he cannot prevail on his retaliation claim since the record shows that his termination was the product of Dietrich's own investigation, as opposed to anything Schmedeke may have told Dietrich about the January 2006 sleeping incident. In any event, I find, as noted above, that Complainant failed to provide any evidence that Respondent's articulation that Complainant's sleeping on the job was not the true reason for his termination.

Recommendation

For all of the above reasons, it is recommended that the instant Complaint and the underlying Charge of Discrimination of Edward McGrone be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

BY: _____
MICHAEL R. ROBINSON
Administrative Law Judge
Administrative Law Section

ENTERED THE 26TH DAY OF MAY, 2009